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IN THE

Supreme Court of the United States

LISA WATSON, *ET AL.*,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FORMER COMMISSIONERS AND SENIOR STAFF OF THE FEDERAL TRADE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE TESTING, MARKETING AND SALE OF LIGHT CIGARETTES IS SUBJECT TO COMPREHENSIVE FEDERAL CONTROL AND REGULATION 5

A. The FTC Employs a Broad Range of Regulatory Tools To Compel Compliance With Its Consumer-Protection Policies 5

B. The FTC Has a Long History of Regulating Claims About Tar and Nicotine Content 7

C. The FTC Requires Uniform Testing of Tar and Nicotine Yields 10

D. The FTC Requires Disclosure of Tar and Nicotine Yields 13

E. The FTC Authorizes and Defines Descriptors Such As "Low Tar" and "Light" for Use As Shorthand References to Tar and Nicotine Yields 16

F. The FTC Maintains Its Policies Despite Awareness of Their Limitations 19

II. CIGARETTE COMPANIES ARE REQUIRED TO COMPLY WITH THE FTC'S REGULATORY DIRECTIVES 22

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Alaska v. O'Neill Investigations, Inc., 609 P.2d 520 (Alaska 1980) 24

Brown v. Brown & Williamson Tobacco Corp., No. 06-30130, 2007 WL 470406 (5th Cir. Feb. 14, 2007) 28-29

Dowhal v. SmithKline Beecham Consumer Healthcare, 88 P.3d 1 (Cal. 2004) 23

FTC v. Brown & Williamson Tobacco Corp., 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part and rev'd in part*, 778 F.2d 35 (D.C. Cir. 1985) 25

FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985) 25-26

FTC v. Mandel Brothers, Inc., 359 U.S. 385 (1959) 24, 27

General Motors Corp. v. Abrams, 897 F.2d 34 (2d Cir. 1990) 23

Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973) 23

In re American Brands, Inc., 79 F.T.C. 255 (1971) 17

In re American Tobacco Co., 119 F.T.C. 3 (1995) 17

In re Benson & Hedges, 33 F.T.C. 1659 (1941) 7

In re Tak Communications, Inc., 138 B.R. 568 (W.D. Wis. 1992), *aff'd*, 985 F.2d 916 (7th Cir. 1993) 23

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 23

Pearson v. Philip Morris, Inc., No. 02-11 2006 WL 663004 (Or. Cir. Ct. Feb. 23, 2006) 29

Prado Alvarez v. R.J. Reynolds Tobacco Co., 313 F. Supp. 2d 61 (D.P.R. 2004), *aff'd*, 405 F.3d 36 (1st Cir. 2005) 29

TABLE OF AUTHORITIES
(Continued)

Page

Price v. Philip Morris, Inc., 848 N.E.2d 1 (Ill. 2005), *cert. denied*, 127 S. Ct. 685 (2006) 29

Schubach v. Household Finance Corp., 376 N.E.2d 140 (Mass. 1978) 24

United States v. Mead Corp., 533 U.S. 218 (2001) 23

Statutes and Regulations

15 U.S.C. § 45 6

15 U.S.C. § 46 6

15 U.S.C. § 53 6

15 U.S.C. § 56 6

15 U.S.C. § 57a 6

15 U.S.C. § 57b 6

15 U.S.C. § 1334 17

28 U.S.C. § 1442 ..... 2, 5, 30

16 C.F.R. § 1.1 (2007) 6

16 C.F.R. § 1.5 (2007) 6

16 C.F.R. § 2.34 17

Other Authorities

Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955) 8

Cigarette Advertising and Other Promotional Practices, Announcement of Decision, 43 Fed. Reg. 11856 (Mar. 22, 1978) 20

Cigarette Testing Request for Public Comment, 62 Fed. Reg. 48158 (Sept. 12, 1997) 18

TABLE OF AUTHORITIES
(Continued)

Page

Cigarette Testing Results, Tar and Nicotine Content, 36 Fed. Reg. 15074 (Aug. 12, 1971) 11

Kenneth C. Davis, *Administrative Law & Government* (2d ed. 1975) 23

False and Misleading Advertising (Filter-Tip Cigarettes): Hearings Before Subcomm. of the Comm. on Gov't Operations H.R., 85th Cong. (1957) 8

FTC Suspends Proceeding to Require Disclosure of Tar and Nicotine Content in Cigarette Advertising After Industry Amends Voluntary Plan, Federal Trade Commission News (Dec. 23, 1970) 15-16

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FTC Operating Manual, *available at* http://www.ftc.gov/foia/adminstaffmanuals.htm (visited March 28, 2007) 6-7, 18

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TABLE OF AUTHORITIES
(Continued)

Page

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Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396 (Aug. 28, 1996) 18

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Roscoe B. Starek, III, *Prosecutorial Discretion: A View From The Federal Trade Commission*, Regulation, Fall 1997, *available at* http://www.cato.org/pubs/regulation/reg20n4d.pdf (visited March 28, 2007) 28

Statement of Federal Trade Commission Chairman Paul Rand Dixon on Activation of Cigarette Testing Laboratory (May 15, 1967) 11

Strengthening the Cigarette Labeling Act, 112 Cong. Rec. 17270 (July 27, 1966) 11

INTEREST OF *AMICI CURIAE*

Amici curiae are former Chairmen, Commissioners and senior staff of the Federal Trade Commission (the "FTC" or the "Commission") who collectively reflect several decades of FTC leadership: James C. Miller III (Chairman, 1981-85), Daniel Oliver (Chairman, 1986-89), George Douglas (Commissioner, 1982-86), Thomas Leary (Commissioner, 1999-2005), Carol Crawford (Director, Bureau of Consumer Protection, 1983-85), John Peterman (Director, Bureau of Economics, 1988-93, and various other senior positions beginning in 1976), and Robert Tollison (Director, Bureau of Economics, 1981-83).[1]

Amici respectfully submit this brief to assist the Court in understanding the full context and nature of the FTC's comprehensive regulatory control over the conduct at issue in this case. *Amici*'s experiences at the FTC give them a unique perspective on the Commission's regulatory approach generally and on the specific role that the FTC has played and continues to play in the regulation of cigarette advertising. In particular, *amici* are intimately familiar with the FTC's decades-long efforts to ensure that consumers receive useful and accurate information about the tar and nicotine content of competing brands of cigarettes. These efforts include employing a variety of formal and informal regulatory tools to foster a uniform standard for measuring

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part. R.J. Reynolds Tobacco Company has made a monetary contribution to this brief's preparation and submission. Messrs. Miller, Oliver, and Peterman have in the past been retained as consultants or expert witnesses for Respondents, but neither they nor any other amici joining this brief are being compensated for their role as *amici* in this case.

tar and nicotine yields, to compel disclosures of those measurements in cigarette advertising, and to define and authorize the use of various descriptors, such as "low-tar" and "light," as shorthand, consumer-friendly references to those measurements.

SUMMARY OF ARGUMENT

This case involves the standard for determining whether a private party is a "person acting under" a federal officer for purposes of the federal officer removal statute, 28 U.S.C. §1442(a)(1). The Eighth Circuit held below that whether a defendant was "acting under" the direction of a federal officer turns on the detail and specificity of the federal government's direction of the challenged activities and whether the government compelled the defendant's compliance with the federal directives. Pet. App. 6a. Applying this test to Respondents' testing, marketing and selling of light cigarettes,[2] which Petitioners contend was deceptive, the Eighth Circuit found the test satisfied because the FTC engages in "comprehensive, detailed regulation and . . . ongoing monitoring" of that activity, and "compel[s] the tobacco companies to adhere to a testing and advertising standard that was prompted by the FTC." Pet. App. 8a, 10a.

Amici take no position on whether the Eighth Circuit articulated the correct legal standard for private-party removal under section 1442(a)(1). *Amici* submit, however, that if the Court were to adopt the Eighth Circuit's interpretation of the statute and allow removal predicated on acts performed pursuant to comprehensive and detailed federal regulations, then Respondents would plainly qualify

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[2] The term "light cigarettes" refers to cigarettes advertised and sold using descriptors such as "low tar" and "lights." As explained below, the FTC has authorized the use of these descriptors as shorthand references to specifically defined ranges of tar yield as measured by FTC-mandated testing.

for removal. As Judge Gruender observed below, the level of the FTC's direction and control of the conduct at issue here—*i.e.*, the testing and marketing of light cigarettes—is "extraordinary." Pet. App. 18a.

The FTC has, for decades, exercised comprehensive and detailed oversight over cigarette companies' claims about the tar and nicotine yields of their products. It has done so using the wide array of formal and informal regulatory tools at its disposal, including rulemaking, policy statements, case-by-case adjudication and consent decrees, advisory opinions, and nominally "voluntary" agreements among the major cigarette manufacturers. Through these measures, the FTC has compelled the cigarette companies to comply with the agency's policy choices concerning the most effective and efficient way to ensure that consumers receive reliable information about the tar and nicotine levels in various cigarettes. Among other things, the FTC:

- developed and mandated the use of a uniform method for determining tar and nicotine yields (referred to as the modified Cambridge Filter Method or the FTC Method), with full awareness of the limitations of the method;
- took the unique step of conducting the tests itself in its own testing laboratory for over twenty years, before eventually delegating testing responsibility to the tobacco industry under FTC specifications and supervision, and publishing those results;
- required cigarette companies to disclose tar and nicotine yields, based on the FTC Method, in all non-permanent cigarette advertising; and
- defined and authorized the use of the descriptors challenged by Petitioners in this case under conditions in which the Commission determined they function as shorthand, consumer-friendly references to FTC Method results.

The FTC took these actions for two very specific reasons: so that consumers would be able to consider tar and nicotine yields in making their brand choices, and so that cigarette manufacturers would be encouraged to compete on the basis of tar and nicotine yields.

The contention, by Petitioners and their *amici*, that these regulations are not compulsory because they resulted from agency action short of rulemaking ignores the realities of the Commission's regulatory strategies. Although the disclosure of tar and nicotine yields results from an agreement among industry participants, that agreement is "voluntary" in name only. The FTC chose to compel such disclosure, but decided—based on past experiences and with the support of members of Congress—that securing an agreement with the major cigarette manufacturers would be more efficient and effective than promulgating a formal rule. The Commission therefore coerced industry participants to enter into an agreement in lieu of rulemaking, demanded that the agreement comply with the agency's exact requirements, and made clear that the FTC would monitor compliance and initiate rulemaking if the agreement turned out to be ineffective. The FTC has similarly demanded, without the need for a formal rule, that cigarette companies strictly limit their use of descriptors such as "light" and "low tar" to cigarettes falling within certain tar ranges as measured by the FTC Method.

In sum, Respondents undertook the conduct challenged in this lawsuit—*i.e.*, testing the tar and nicotine yields of their light cigarettes and making representations about those yields—pursuant to detailed and specific requirements imposed on them by the FTC. For this reason, under the Eighth Circuit's interpretation of section 1442(a)(1), Respondents were entitled to remove this action to federal court.

ARGUMENT

The Eighth Circuit held that a private party is "acting under" a federal officer for purposes of the federal officer removal statute, 28 U.S.C. § 1442(a)(1), where that party is compelled by a federal agency to comply with detailed and specific requirements under a comprehensive federal regulatory scheme. This standard is readily satisfied in a case, like this one, challenging the testing, marketing and sale of light cigarettes. The FTC has, over the course of several decades, established detailed and specific regulations governing the measurement of tar and nicotine yields, as well as advertising claims about the tar and nicotine content of cigarettes. In doing so, the FTC made the deliberate choice to forego the promulgation of formal rules in favor of more flexible regulatory alternatives. That the Commission chose this strategy does not make acquiescence with its regulatory directives optional. To the contrary, the FTC expects cigarette companies to market their products in full compliance with the Commission's regulatory directives, and subjects companies that fail to do so to adverse legal action.

I. THE TESTING, MARKETING AND SALE OF LIGHT CIGARETTES IS SUBJECT TO COMPREHENSIVE FEDERAL CONTROL AND REGULATION

Over the course of several decades, the FTC has used a broad array of regulatory tools to impose detailed and specific requirements relating to the testing of, and advertising claims about, tar and nicotine yields in cigarettes.

A. The FTC Employs a Broad Range of Regulatory Tools To Compel Compliance With Its Consumer-Protection Policies

As an independent agency with far-reaching regulatory powers, the FTC employs a variety of tools in carrying out

its broad mandate to protect consumers from "unfair or deceptive acts or practices." Federal Trade Commission Act ("FTC Act") § 5(a)(1), 15 U.S.C. § 45(a)(1).[3] The FTC Act authorizes the Commission to promulgate rules, known as Trade Regulation Rules, through notice-and-comment rulemaking. *See* FTC Act §§ 6(g), 18, 15 U.S.C. §§ 46(g), 57a. The Act also empowers the Commission to initiate administrative adjudication and to seek injunctive and monetary relief in federal court. *See* FTC Act §§ 5(m), 13, 19, 15 U.S.C. §§ 45(m), 53, 57b.

The FTC also employs several less formal mechanisms to achieve regulatory compliance. For example, it frequently issues Industry Guides that serve as "administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements." 16 C.F.R. § 1.5 (2007). These Guides "provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry," *id.*, and are especially useful in getting firms to abandon practices simultaneously where each firm may be reluctant to lose a competitive advantage by doing so unilaterally. *See FTC Operating Manual* ch. 8 § 3.3, *available at* http://www.ftc.gov/foia/adminstaff-manuals.htm (visited March 28, 2007). The FTC similarly issues Advisory Opinions in response to requests by private parties. *See* 16 C.F.R. § 1.1 (2007). These Opinions are "binding upon the Commission with respect to the person or group to whom such opinion is issued with regard to the acts, practices, or conduct described in the request." *FTC Operating Manual* ch. 8 § 4.3.

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[3] Indeed, the FTC's independence extends, under some circumstances, to its litigation authority in this Court. *See* FTC Act § 16, 15 U.S.C. § 56(a)(3)(A). There is no evidence that the brief of the Solicitor General in this case reflects the views of the FTC.

Finally, the FTC uses the threat of formal agency action, such as rulemaking or litigation, to encourage industry participants to agree voluntarily to prevent unfair or deceptive practices. The FTC thus frequently enters into consent decrees to end or forestall litigation. *Id.* ch. 6 § 3. The FTC similarly encourages industry participants to adopt "voluntary" agreements as a substitute for trade regulation rules. Between 1919 and the 1960s, for instance, the FTC regularly held trade practice conferences to encourage industries to write their own rules, subject to final approval by the Commission. *See Federal Trade Commission 90th Anniversary Symposium—Program Brochure* 6-7 (Sept. 22-23, 2004), *available at* http://www.ftc.gov/ftc/history/90thAnniv_Program.pdf (visited March 28, 2007). Because formal agency action typically entails the expenditure of significant resources by both the FTC and the industry, the solicitation of such "voluntary" agreements is often the most efficient way for the FTC to achieve its regulatory objectives.

As explained below, during the FTC's long history of regulating cigarette advertising, it has successfully employed all of these regulatory tools. It litigated against tobacco companies for making misleading tar and nicotine claims; it provided Industry Guides for cigarette advertising; it issued Advisory Opinions on tar and nicotine claims; it used the threat of rulemaking to orchestrate a "voluntary" agreement among the major cigarette companies to provide tar and nicotine data in their print advertising; and it published policy statements concerning tar and nicotine advertising in the *Federal Register* and in its FTC News Releases.

B. The FTC Has a Long History of Regulating Claims About Tar and Nicotine Content

The FTC's long history of regulating claims about the tar and nicotine yields of cigarettes dates back decades. *See, e.g., In re Benson & Hedges*, 33 F.T.C. 1659, 1659-60 (1941) (FTC enforcement action).

By the 1950s, the cigarette industry had responded to the growing awareness of the health risks of cigarettes by creating and marketing filtered cigarettes as lower in tar and nicotine. Given uncertainties at the time about the health effects of tar and nicotine, the FTC initially sought to enjoin questionable advertising claims about filters and tar and nicotine yields. *See False and Misleading Advertising (Filter-Tip Cigarettes): Hearings Before a Subcomm. of the Comm. on Gov't Operations H.R.*, 85th Cong. 274-75 (1957) (statement of FTC Acting Chairman Robert T. Secrest) [hereinafter Secrest Statement]. But because the FTC was not equipped to test cigarettes and there was no standardized test, it was difficult to prove that any particular claims were deceptive or unfair. *Id.* at 275-76.

As an alternative to litigation, therefore, the FTC decided to work with the industry to establish guidelines for cigarette advertising. In September 1955, following consultation with cigarette manufacturers, the agency formally adopted the Cigarette Advertising Guides for the use of its staff in evaluating cigarette advertisements. *Id.* at 276. Among other things, the Cigarette Advertising Guides permitted claims about tar, nicotine, and other ingredients of cigarette smoke so long as such claims had been "established by competent scientific proof." Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955). By 1957, working under the Guides, the FTC had obtained voluntary discontinuance of seventy-five advertising claims it found objectionable, without having to institute any formal proceedings; many other objectionable advertisements were abandoned before they ever reached the public. Secrest Statement, *supra*, at 278-79. During his congressional testimony in 1957, FTC Chairman Secrest expressed satisfaction with the FTC's regulatory achievements:

> [The] adoption and administration of the guides did more to prevent deceptive advertising of cigarettes and to fulfill the Commission's responsibility to the public

> than it could possibly have accomplished by any other means.

Id. at 279-80.

Notwithstanding these efforts, during the second half of the decade, cigarette companies continued competing to produce and advertise cigarettes with lower tar and nicotine yields. During this "tar derby," as the period of competition became known, cigarette companies employed different tar and nicotine testing methods to substantiate their claims about the lower yields of certain brands. Concerned that the lack of a uniform testing method was confusing to consumers, the FTC in December 1959 ended the "tar derby" by demanding that cigarette companies eliminate all references to low or reduced tar or nicotine in their advertisements. *See* Correspondence from William H. Brain, FTC Bureau of Consultation Attorney, to John Vance Hewitt (Dec. 17, 1959) (J.A. 12). The FTC backed up this demand with a threat to refer non-complying advertisements to the agency's enforcement bureaus. *Id.* The FTC subsequently sought and obtained signed undertakings from the seven major cigarette manufacturers to eliminate all references to tar and nicotine claims from cigarette advertising. *See* 1960 FTC Ann. Rep. 82.

FTC Chairman Paul Rand Dixon described these measures as notice to the industry that the FTC would deem "any reference to tar or nicotine content" sufficient to "support a complaint" for false and misleading advertising. *See* Correspondence from Paul Rand Dixon, FTC Chairman, to Warren G. Magnuson, Chairman of U.S. Senate Committee on Commerce 3 (Apr. 11, 1966) [hereinafter *Dixon-Magnuson Correspondence*]. Although the measures stopped short of formal regulatory action, C. Lee Peeler, then Deputy Director of the FTC's Bureau of Consumer Protection, described them as a "ban" on tar and nicotine advertising. C. Lee Peeler, *Cigarette Testing and the Federal Trade Commission: A Historical Overview, in*

National Cancer Institute, *Smoking and Tobacco Control Monograph 7: The FTC Cigarette Test Method for Determining Tar, Nicotine, and Carbon Monoxide Yields of U.S. Cigarettes* 1, 2 (1996), *available at* http://cancercontrol.cancer.gov/tcrb/monographs/7/index.html (visited March 28, 2007).

C. The FTC Requires Uniform Testing of Tar and Nicotine Yields

During the 1960s, the FTC's total ban on tar and nicotine advertising was called into question as mounting scientific evidence indicated that the health risks of smoking could be lowered through reductions in tar and nicotine yields. The American Cancer Society, for example, expressed its "conviction . . . that the Federal Trade Commission can render a major service to the health of the public by rescinding its restriction relative to the mention of the tar and nicotine content of cigarette smoke in cigarette advertising and on the packages of the various brands of cigarettes." *Dixon-Magnuson Correspondence*, *supra*, at 8-9 (internal quotation marks omitted).

In response to such demands, the FTC notified the nation's cigarette manufacturers of its determination that factual statements about tar and nicotine yields would no longer be deemed to violate the FTC Act or the 1955 Cigarette Advertising Guides provided that no collateral health claims were made, and that claims about tar and nicotine content were supported by testing conducted in accordance with a uniform testing protocol approved by the FTC. *See* FTC News Release (Mar. 25, 1966) (J.A. 20-21). The FTC subsequently solicited comments and held public hearings on the proper testing protocol, *see Cigarette and Related Matters: Methods To Be Employed in Determining Tar and Nicotine Content; Notice of Public Hearing*, 31 Fed. Reg. 14,278 (Nov. 4, 1966) (J.A. 27-29), and, in reliance on comments and testimony, ultimately adopted as its testing protocol a modified version of the Cambridge Filter Method

that became known as the "FTC Method." *See Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11178 (Aug. 1, 1967) (J.A. 46-47); FTC News Release, *FTC to Begin Cigarette Testing* (Aug. 1, 1967) [hereinafter *Testing Release*] (J.A. 52-56).[4]

In response to calls by members of Congress for the FTC to itself conduct cigarette testing, *see, e.g.*, *Strengthening the Cigarette Labeling Act*, 112 Cong. Rec. 17270, 17274-75 (July 27, 1966) (Sens. Magnuson and Kennedy), the FTC took the "very unusual" step of opening its own testing laboratory in May 1967, J.A. 290, and began testing cigarettes under the FTC Method on August 1, 1967. *See* Statement of Federal Trade Commission Chairman Paul Rand Dixon on Activation of Cigarette Testing Laboratory (May 15, 1967); *Testing Release*, *supra*. The FTC published the results of its testing approximately every year in the *Federal Register* and in its annual reports to Congress. *See, e.g.*, *Cigarette Testing Results, Tar and Nicotine Content*, 36 Fed. Reg. 15074 (Aug. 12, 1971).

In 1987, the FTC delegated testing responsibility to the private Tobacco Industry Testing Lab (the "TITL"). *See* Correspondence from John P. Rupp, Attorney for cigarette manufacturers, to Judith P. Wilkenfeld, Program Director of Cigarette Advertising and Testing at FTC (June 30, 1987).

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[4] The FTC Method uses a machine to measure the tar and nicotine yielded when a cigarette is smoked according to specific parameters:

> The FTC regulations involve the use of a cigarette smoking machine. The machine is set to specific parameters governing the depth to which the cigarette is inserted, the volume of air drawn through the burning cigarette with each "puff," the number of puffs drawn per minute and the amount of the cigarette consumed. The tar and nicotine captured by a filter in the machine are then measured.

Pearson v. Philip Morris, Inc., No. 0211-11819, 2006 WL 663004, at *1 (Or. Cir. Ct. Feb. 23, 2006).

Testing at the TITL is conducted under FTC monitoring and supervision, including periodic unannounced inspections, and the FTC uses compulsory process to require the tobacco companies to submit the TITL's measurements to the FTC in sworn statements under penalty of perjury. *See, e.g., Report on the Tar, Nicotine, and Carbon Monoxide of the Smoke of 1249 Varieties of Domestic Cigarettes For the Year 1995*, 63 Fed. Reg. 3576 (Jan. 23, 1998).

The FTC does not permit deviation from the FTC Method. To the contrary, the Commission adopted an official method precisely because it believed the test provided a "reasonable standardized method" that was "capable of being presented to the public in a manner that is readily understandable." *Testing Release*, *supra*, at 1 (J.A. 53). The FTC therefore made clear from the start that it would deem deceptive the use of measurements derived from any method other than the FTC Method, because "[u]se of more than one testing method would . . . only serve to confuse or mislead the public." *Id.* at 1-2 (J.A. 53). Indeed, in 1978, the FTC issued an Advisory Opinion rejecting a request to use a measurement method other than the FTC Method, even if the method would produce *higher* tar and nicotine yields, because of the potential for consumer confusion. *See Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved*, 92 F.T.C. 1035, 1035 (1978) (J.A. 201-02).

In its 1968 Report to Congress, the FTC made clear its motivation for replacing its earlier ban on tar and nicotine advertising with its new testing regime:

> Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public, the Commission has acted within the past year to (1) augment information available to the public on the tar and nicotine content of cigarettes and (2) prompt

> cigarette manufacturers to develop less hazardous cigarettes.

Federal Trade Commission, *Report to Congress Pursuant to the Federal Cigarette Labeling and Advertising Act* 17 (June 30, 1968) [hereinafter *1968 Report to Congress*] (J.A. 15).

D. The FTC Requires Disclosure of Tar and Nicotine Yields

The FTC's 1966 policy reversal was only the first step taken by the FTC to help inform consumers about machine-measured tar and nicotine yields of cigarettes. Soon after, the FTC took steps to require manufacturers to include tar and nicotine yield disclosures in all cigarette advertising. Furthermore, the FTC determined that it would authorize and permit other representations of tar and nicotine—including the very sort of product descriptors challenged by Petitioners in this action (for example, "low tar" and "light")—so long as such representations and advertising claims were substantiated by FTC Method test results.

On August 8, 1970, the FTC formally proposed a Trade Regulation Rule requiring cigarette manufacturers to "disclose, clearly and prominently, in all advertising the tar and nicotine content of the advertised variety or varieties [of cigarettes] . . . based on the most recently published Federal Trade Commission test results." *Advertising of Cigarettes: Notice of Public Hearing and Opportunity To Submit Data, Views, or Arguments Regarding Proposed Trade Regulation Rule*, 35 Fed. Reg. 12671, 12671 (Aug. 8, 1970) (J.A. 135). The FTC explained that such disclosures were necessary to encourage "greater interest in obtaining a low tar and nicotine cigarette" and to facilitate "competition among the cigarette companies to meet that interest." Federal Trade Commission, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act* 15 (Dec. 31, 1970) [hereinafter *1970 Report to Congress*].

Congress and the FTC recognized, however, that it would be preferable to avoid the attendant costs and delays of

notice-and-comment rulemaking. During his confirmation hearings, FTC Chairman-designate Kirkpatrick was asked about the possibility of pursuing an industry-wide agreement as an alternative:

> Senator Magnuson: I wanted to ask you if [the proposed Trade Regulation Rule on tar and nicotine listing in advertising] can be done by voluntary agreement, without the need of long, drawn out litigation or further legislation, would that be better than the rule?
>
> Kirkpatrick: In my judgment; yes, sir.
>
> . . . .
>
> Senator Magnuson: [I]t seems to me if there could be achieved a voluntary agreement on this tar and nicotine, which this committee has long pursued, or at least we have been talking about it, that that might be the better arrangement.
>
> Kirkpatrick: It would be a highly desirable arrangement, sir; indeed, yes.

Nomination—1970: Hearing Before the S. Comm. on Commerce on Nomination of Miles W. Kirkpatrick, To Be Chairman of the Federal Trade Commission, 91st Cong. 172 (1970) (J.A. 140-41).

Accordingly—as it did a decade earlier in successfully ending the tar derby—the FTC took steps to prompt cigarette manufacturers to comply "voluntarily" with the FTC's desired requirements. With the proposed trade regulation rule looming, the Commission directed participants in the tobacco industry to submit a plan describing how they would agree to disclose tar and nicotine yields in cigarette advertising. *See FTC Directs Tobacco Industry to Submit Specifics on Disclosing Tar and Nicotine Content*, Federal Trade Commission News (Oct. 1, 1970) (J.A. 145). The Commission subjected the initial industry proposal to a period of public comment, and Commission staff ultimately

recommended rejecting the proposal and threatened to continue the rulemaking process unless a number of changes were made. *See* Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection, to Commission (Nov. 9, 1970) (J.A. 148-58); Correspondence from FTC Chairman Miles W. Kirkpatrick to Commission (Nov. 24, 1970) (J.A. 159). The cigarette companies made concessions, and, on December 22, 1970, after the agreement had been revised to the FTC's exact requirements, the FTC voted to accept the agreement (the "1970 Agreement"), suspend the rulemaking proceeding indefinitely, and thereby "afford the tobacco industry an opportunity to implement the letter and the spirit of the amended plan." Correspondence from Allen F. Brauninger, Attorney in FTC Bureau of Consumer Protection, to Commission (Dec. 21, 1970) [hereinafter Brauninger Dec. 21, 1970 Correspondence] (J.A. 160-93); Correspondence from Joseph W. Shea, Secretary, to General Counsel, Director of Bureau of Consumer Protection, Director of Public Information, and Legal and Public Records (Dec. 22, 1970).

The 1970 Agreement requires that tar and nicotine yield measurements be disclosed in non-permanent cigarette advertising with the legend "av. per cigarette by FTC method." Brauninger Dec. 21, 1970 Correspondence (J.A. 168). The FTC characterized its exaction of the agreement as "Regulatory Activity" in its 1970 report to Congress, *see 1970 Report to Congress*, *supra*, at 17-20, and warned the cigarette industry that it would reinitiate rulemaking if the agreement was not effective in compelling tar and nicotine yield disclosures. *See* Brauninger Dec. 21, 1970 Correspondence (J.A. 160-63); *FTC Suspends Proceeding to Require Disclosure of Tar and Nicotine Content in Cigarette*

Advertising After Industry Amends Voluntary Plan, Federal Trade Commission News (Dec. 23, 1970).[5]

E. The FTC Authorizes and Defines Descriptors Such As "Low Tar" and "Light" for Use As Shorthand References to Tar and Nicotine Yields

As the final prong of its regulatory program, the FTC approved the use of descriptors, such as "low tar" and "light," to refer to specified yields of tar. The Commission recognized that, to the extent the descriptors functioned merely as shorthand, consumer-friendly references to FTC Method results, their use supported the FTC's dual goals of providing consumers with information about tar and nicotine yields and encouraging the manufacture of lower-yield cigarettes.

When the FTC reversed its policy in March 1966 and allowed the advertising of tar and nicotine yields, it was not immediately clear to what extent the Commission would permit representations beyond the numerical test results, especially given the FTC's statement that no "collateral" representations would be permitted. *See supra* p. 10. Ultimately, the FTC adopted and publicized an "enforcement policy" providing that "representations relating to[] tar and nicotine content of cigarettes" are permissible "where they are shown to be accurate and fully substantiated by" FTC Method results. FTC News-Release (Oct. 26, 1967). The FTC repeated its position on this issue in its 1968 Report to Congress. *See 1968 Report to Congress*, *supra*, at 18 (J.A. 15-16).

Consistent with this policy, and as a signal to the entire industry, the FTC in 1969 launched a proceeding against a

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[5] As detailed below, *see infra* pp. 25-26, the FTC has successfully taken enforcement action against cigarette companies that tried to deviate from the disclosures required by the 1970 Agreement.

cigarette manufacturer for stating that certain brands were "lower" in tar in the absence of substantiation by the FTC Method. *See In re Am. Brands, Inc.*, 79 F.T.C. 255 (1971) (J.A. 203-08). In a 1971 decree resolving the case, the FTC reaffirmed that it would permit the use of descriptive terms such as "low," "lower," "reduced," and "like qualifying terms" only if their use was substantiated by the FTC Method and was accompanied in advertising by a disclosure of the underlying tar and nicotine numbers under the FTC Method (as is required for all cigarette advertising by the 1970 agreement discussed above). *Id.* at 258-59 (J.A. 207-08).[6] Years later, in another consent decree, the FTC again reaffirmed that "express or implied representation[s] . . . that [a] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine" are not misleading or deceptive only if those representations are substantiated by FTC Method results. *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995). Before entry of this order, the FTC described this statement as providing "a limited 'safe harbor' for advertising that complies with certain specific requirements in its use of official tar and nicotine ratings." *The American Tobacco Company; Proposed Consent Agreement With Analysis To Aid Public Comment*, 59 Fed. Reg. 51980, 51982 (Oct. 13, 1994) (J.A. 222).[7]

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[6] The FTC lacked the power to impose a corresponding disclosure requirement with respect to descriptors on cigarette packages. *See* Federal Cigarette Labeling and Advertising Act § 5(a), 15 U.S.C. §-1334(a) ("No statement relating to smoking and health, other than the statement required by [this Act], shall be required on any cigarette package.").

[7] Consistent with the FTC's policy for all consent decrees, 16 C.F.R. § 2.34, the *American Brands* and *American Tobacco* consent decrees were published for notice and comment. *See* 59 Fed. Reg. 51980; *FTC Consent Order Forbids Unlimited 'Low Tar' Claims by Cigarette Maker*, FTC News (July 13, 1971). The FTC engages in notice and comment for consent decrees because of its recognition that consent decrees provide

In its 1968 Report to Congress, the FTC also adopted the convention, since then continuously followed both inside and outside the industry, of using the descriptor "low tar" to refer to 15 milligrams or less of tar yield, measured by the FTC Method. *See 1968 Report to Congress, supra*, at 18 (J.A. 15). The FTC has reiterated over the years that it "formally defines a low 'tar' cigarette as one that has 15.0 or less milligrams of 'tar.'" Matthew L. Myers *et al.*, *Staff Report on the Cigarette Advertising Investigation* 1–50 n.175 (1981); *see also* Correspondence from FTC Chairman Janet D. Steiger to Samuel Broder, Director of National Cancer Institute 3 (July 20, 1994) (using the term "low-tar" to refer to cigarettes with less than 15 milligrams of tar).[8] Other government agencies have recognized these definitions. *See, e.g.*, *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. 44396, 44952 (Aug. 28, 1996) (noting that "[a]pproximately 80% of the cigarettes on the market today are either low-tar (6 to 15 mg tar) or ultra-low-tar (less than 6 mg tar)"). Additionally, the FTC treats the descriptor "light" as synonymous with "low tar." *See, e.g.*, *Cigarette Testing Request for Public Comment*, 62 Fed. Reg. 48158, 48163 (Sept. 12, 1997).

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industry-wide guidance as to the FTC's regulatory policies. *See FTC Operating Manual* ch. 6, §§ 11-.15.

[8] *See also* Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1979*, at 11 n.8 ("'low tar' [is] define[d by the Commission] as 15.0 mg. or less tar") (J.A. 210); Federal Trade Commission, *Report to Congress Pursuant to the Cigarette Labeling and Advertising Act—For the Year 1980*, at 18 n.11 (same) (J.A. 213); Ira Taylor Whitten, *Brand Performance in the Cigarette Industry and the Advantage to Early Entry, 1913-74, Staff Report to the Federal Trade Commission* 35 (June 1979) (referring to the FTC's "official definition of low-tar cigarettes (15 or less milligrams of tar)").

The FTC's definitions of these descriptors are well-understood in the public-health community. The 1981 Surgeon General Report, for example, stated that "[l]ower 'tar' cigarettes conventionally have been defined as yielding 15 mg of 'tar' or less per cigarette." U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, A Report of the Surgeon General* 23 (1981). Similarly, the National Cancer Institute has explained:

> In the United States, cigarette brands yielding approximately 1-5 or 6 mg tar by [the FTC] method are generally called 'Ultra-Light'; brands yielding between approximately 6 or 7-15 mg tar are called 'Light'; and brands yielding more than 15 mg tar are called 'Regular' or 'Full Flavor.' By convention, cigarettes yielding 15 mg tar by the FTC method are called 'low tar.'

Lynn T. Kozlowski *et al.*, *Cigarette Design*, *in* National Cancer Institute, *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* 13 (2001), available at http://cancercontrol.cancer.gov/tcrb/monographs/13/ (visited March 28, 2007).

F. The FTC Maintains Its Policies Despite Awareness of Their Limitations

From the beginning of its testing program, the FTC was aware that while the FTC Method accurately measured the comparative tar and nicotine yields among different brands of cigarettes when smoked under the identical circumstances simulated by the machines, it was of limited use in measuring or predicting actual tar and nicotine intake by individual smokers. The Commission explained to the public at the time it began testing that:

> [t]he [FTC] Method does not and cannot measure the[] many variations in human smoking habits. It does not measure tar or nicotine in the smoke generated while

> the cigarette is not being puffed. It does not measure all of the tar and nicotine in any cigarette, but only that in the smoke drawn in the standardized machine smoking according to the prescribed method. Thus, the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by [a] machine in accordance with the prescribed method.

Testing Release, *supra*, at 2.

Nor did the adoption of the FTC Method end the Commission's investigation of its method's limitations. Since it began testing in 1967, the FTC has repeatedly considered whether it should abandon or modify its regulatory program in response to the very theories and allegations asserted by Petitioners in this case. On each occasion, the FTC has declined to change its program, and use of the FTC Method is still required today. *See, e.g.*, *Cigarette Testing, Tar and Nicotine Content Results*, 42 Fed. Reg. 21155, 21155 (Apr. 25, 1977) (noting questions about method but declining to take further action) (J.A. 127-28); *Commission Determination re Barclay Cigarettes; Amendment of Report of "Tar," Nicotine, and Carbon Monoxide Content of 208 Varieties of Cigarettes; Request for Comment on Possible Testing Modifications*, 48 Fed. Reg. 15953, 15954-55 (Apr. 13, 1983) (seeking public comment on implications for testing of "compensatory smoking behavior") (J.A. 129-34); *Cigarette Advertising and Other Promotional Practices, Announcement of Decision*, 43 Fed. Reg. 11856, 11856-57 (Mar. 22, 1978) (recognizing that smokers may "compensate" for low-tar cigarettes by covering ventilation holes and thereby increasing the amount of tar inhaled, but nonetheless deciding to retain FTC Method testing).

In declining to change its regulatory program notwithstanding evidence of smoker compensation, the FTC

relied on epidemiological studies showing that persons who smoked cigarettes that measured lower in tar under the FTC Method were less likely to get smoking-related diseases than were persons who smoked cigarettes that measured higher in tar under the FTC Method. *See* Peeler, *supra*, at 7. As the FTC's Bureau of Consumer Protection subsequently explained:

> [A]bandoning the testing system without instituting another method of tar testing would have been premature because then-current epidemiological evidence suggested that there had been a reduction in lung cancer deaths that might be attributable to declines in average tar levels that had occurred since the 1950's.

Id. In fact, at the time, FTC staff specifically opposed abandoning the FTC's program because of fears that without the program, "cigarettes will gradually become higher in tar and nicotine," which "[e]vidence clearly indicates . . . would be harmful." Undated Memorandum from Judith P. Wilkenfeld & Susan Cohn to Commission re "Modification of FTC Cigarette Testing Methodology," at 42 n.41.

The FTC also specifically investigated the use of descriptors in view of allegations similar to those made by Petitioners here. For example, in 1992, at the behest of a consumer group, the FTC launched an investigation focused specifically on whether the terms "light" and "low tar" should be prohibited as deceptive. *See* Coalition on Smoking OR Health, Petition Before the Federal Trade Commission (1992). The FTC decided to continue to permit the use of these descriptors, as substantiated by FTC Method results. *See* Correspondence from John D. Graubert, FTC's Deputy General Counsel, to Lucia M. Valente, Counsel to New York Attorney General (Sept. 10, 1998). Similarly, in 1998, Senator Lautenberg requested that the FTC "begin a proceeding to suspend the right of tobacco companies to market any cigarettes as 'Light' or 'Ultra Light' or list

supposed nicotine and 'tar' ratings on their products and advertisements until and unless an accurate system of measuring the health implications of cigarettes is established." Correspondence from Senator Frank R. Lautenberg to FTC Chairman Robert Pitofsky (Nov. 24, 1998). The FTC again declined the request, explaining that the request "raised issues currently under review at the Commission." Federal Trade Commission, *FTC Statement in Response to Senator Frank Lautenberg's Letter*, FTC News (Nov. 24, 1998).

II. CIGARETTE COMPANIES ARE REQUIRED TO COMPLY WITH THE FTC'S REGULATORY DIRECTIVES

As detailed above, in advertising and marketing light cigarettes, companies are subject to specific and detailed federal regulation imposed by the FTC to further the agency's considered regulatory policies. Specifically, the FTC requires cigarette companies (i) to subject all brands to testing for tar and nicotine yields pursuant to the FTC Method, (ii) to disclose on all cigarette advertising the tar and nicotine yields as measured by the FTC Method, and (iii) to use non-numeric descriptors such as "low-tar" and "light" only as shorthand, consumer-friendly references to specifically defined ranges of tar yield under the FTC Method.

Petitioners and their *amici* contend, however, that these regulatory directives are not compulsory because they are embodied in informal agency statements, nominally "voluntary" agreements among the major cigarette manufacturers, and consent orders with individual companies, rather than in a formal trade regulation rule. *See* Pet. Br. at 39-48; Amicus Br. of Campaign for Tobacco-Free Kids *et al.* at 5-24. In taking the steps described above, however, the FTC appropriately selected among the broad array of regulatory tools in its arsenal to craft an effective

and efficient regulatory scheme that is no less compulsory than more formal agency action.

1. The FTC's decision to forego rulemaking in light of its inefficiencies, *see supra* pp. 13-15, is a perfectly appropriate means of pursuing the Commission's regulatory policies. Courts and commentators have long recognized that federal agencies develop and communicate their policies and directives by choosing among "the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it." *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).[9]

The FTC is the classic example of an agency that has "a broad range of flexible enforcement powers available for use, as deemed necessary in [its] sound discretion and expert judgment." *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 997 (D.C. Cir. 1973); *see also Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) ("Congress has authorized the FTC to exercise its supervisory powers under the [FTC] Act in a variety of ways."). As detailed above, the FTC has a long history of expertise in using informal means—including advisory opinions, industry guides, agreements among major industry participants, and exemplary enforcement actions—to secure adherence to FTC policies. *See supra* pp. 6-7. These informal tools, no less than notice-and-comment

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[9] *See also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein" (internal quotation marks omitted, ellipsis in original)); *In re Tak Communications, Inc.*, 138 B.R. 568, 578 (W.D. Wis. 1992) (FCC policy communicated through a series of denials of licensing applications), *aff'd*, 985 F.2d 916 (7th Cir. 1993); *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 10 (Cal. 2004) (FDA policy established through informal letter); Kenneth C. Davis, *Administrative Law & Government* 283 (2d ed. 1975); Charles H. Koch, Jr., *Administrative Law & Practice* § 5.43 (1997).

rulemaking, constitute enforcement of federal law by the Commission. Indeed, this Court has held that the FTC's consistent administrative "construction [of a statute that it administers] is entitled to great weight even though it was applied in cases settled by consent rather than in litigation." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 391 (1959) (internal citations omitted).[10]

2. The FTC used just such a combination of formal and informal tools in directing cigarette companies to test and disclose tar and nicotine yields pursuant to the FTC Method. Petitioners' characterization of the testing and disclosure as mere voluntarily adherence to an agreement to which the FTC is not a party ignores the context and effect of the 1970 Agreement and the steps that FTC has taken to ensure compliance with the agreement.

The 1970 Agreement arose against the backdrop of a proposed FTC trade regulation rule that would have required cigarette companies to disclosure tar and nicotine yields measured pursuant to the FTC Method. *See supra* p. 13. With the support of members of Congress, however, the FTC hoped to avoid "long, drawn out litigation" by pursuing the "highly desirable arrangement" of an agreement among the major industry participants. *See supra* p. 14. The FTC had recent experience with such an agreement, having successfully used the device to end the "tar derby" a decade earlier. *See supra* pp. 9-10. The FTC thus used the threat of rulemaking and enforcement action to effectively coerce the cigarette companies to enter into the 1970 Agreement on the FTC's own terms. *See supra* pp. 14-16. That is why the

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[10] *See also Alaska v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529 (Alaska 1980) (FTC consent decrees constitute "administrative interpretation[s]" with "precedential value"); *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 141 (Mass. 1978) (FTC's policy inferred from complaints and cease and desist orders).

FTC characterized its acceptance of the agreement as "Regulatory Activity." *1970 Report to Congress*, *supra*, at 17-20.

In addition to using the 1970 Agreement to mandate testing and disclosure pursuant to the FTC Method, the Commission put the cigarette industry on notice that it intends to bring an enforcement action, for unfair and deceptive practices, against any cigarette company that uses a measurement method other than the FTC method, even if that method yields *higher* tar and nicotine yields. *See supra* pp. 11-12 (describing FTC's 1967 News Release and its 1978 Advisory Opinion). Indeed, that the testing-and-disclosure regime established by the 1970 Agreement effectively binds the industry is exemplified by the FTC's 1983 enforcement action against Brown & Williamson.

In that case, the FTC determined that a new Brown & Williamson cigarette was designed in an unusual way to register inaccurately low tar and nicotine yields during FTC Method testing. *See FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part and rev'd in part*, 778 F.2d 35 (D.C. Cir. 1985). Brown & Williamson rejected the FTC's demand that it alter its advertisements to state a higher estimated yield, instead maintaining the lower figure and referencing its own independent testing, rather than the FTC Method. Despite conceding the "literal truth" of the company's advertising claim, 580 F. Supp. at 984, the FTC sought and obtained an injunction barring use of that claim.

The D.C. Circuit upheld the district court's injunction without direct evidence of consumer confusion on the ground that deviation from the FTC Method was "inherently deceptive." 778 F.2d at 41-42. Noting that "tar milligram figures have significance only as comparative values," the court of appeals upheld the FTC's and district court's conclusions that no disclaimer disclosing use of a method other than the FTC Method could possibly eliminate the

deception that would necessarily arise from the use of another testing method. *Id.* at 42-43. The court based this conclusion on the district court's findings that "after 12 years of exposure to FTC ratings, consumers have become 'habituated' to the tar and nicotine 'legends' in cigarette advertisements" and would likely not understand than any disclaimer "signified a departure from the long-utilized FTC Report numerical ratings." *Id.* at 43.

The D.C. Circuit's holding thus endorsed the FTC's view that departure from the system of testing and disclosure established by the 1970 Agreement constitutes a violation of federal law.[11] In light of this ruling and the FTC's clear statement of its enforcement position, it ignores reality to contend that the FTC's testing-and-disclosure regime is anything but compulsory.

3. Petitioners also point to the absence of any applicable Trade Regulation Rule in support of their contention that the FTC does not control the cigarette companies' use of descriptors such as "light" and "low-tar." This argument, too, relies on too narrow a view of the FTC's regulatory strategies. The FTC made a policy determination that it was in the interests of consumers for cigarette

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[11] The D.C. Circuit did narrow the scope of the district court's injunction, which had permanently enjoined any and all such future departures, but only after envisioning a theoretical scenario in which one cigarette company conducted independent testing of all competing brands and prominently displayed the comparative results in its advertisements. 778 F.2d at 45. Because such a hypothetical advertisement might not be inherently deceptive, the D.C. Circuit reasoned, the FTC would, in the absence of a specific Trade Regulation Rule, retain the burden of proving deceptiveness under the FTC Act. *Id.* The court's refusal to enjoin this highly unrealistic theoretical deviation from the FTC's testing-and-disclosure regime was based on First Amendment concerns about an "impermissibly broad prior restraint," *id.* at 43, and is fully consistent with the court's broader endorsement of the FTC's position.

companies to compete on the basis of such descriptors; it prompted their use by announcing to the industry that descriptors were permissible in advertising so long as they were substantiated by FTC Method results; and it repeatedly defined the descriptors so that their usage in the industry—by cigarette companies, public health professionals and government entities alike—became standardized. *See supra* pp. 16-19.

The fact of this FTC policy determination is further confirmed by the action the FTC brought in 1969 against American Brands, Inc. for claiming that certain of its cigarette brands were "lower" in tar when the claim was not substantiated by the FTC Method. *See supra* pp. 16-17. This action put the industry on notice that any use of descriptors unsupported by comparative testing using the FTC Method would be viewed as an unfair and deceptive trade practice.

4. Petitioners contend that the consent orders that resulted from the FTC enforcement actions against Brown & Williamson and American Brands do not constitute regulatory direction because they are not by their terms binding on other industry participants. *See* Pet. Br. at 44-48. While it is technically true that a consent order runs against the defendant only—the FTC could not, for example, seek to hold Respondents in contempt for violating the American Brands consent order—it is also beside the point. The FTC's position that a practice violates the Act "is entitled to great weight even though it was applied in cases settled by consent." *Mandel Bros.*, 359 U.S. at 391. Moreover, the consent orders signal the FTC's enforcement policies to the industry, letting other manufacturers know what practices will result in an enforcement action by the Commission, and providing them with the opportunity to adjust their behavior accordingly.

In 1987, then-chairman of the FTC, Daniel Oliver, testified before Congress that "it is more efficient," and

therefore "serves the consumers' interest better," for the FTC "to bring a single case against the first offender in order to stop the practice" without the need for rulemaking. *FTC Nicotine Program: Hearing Before the Subcomm. on Transp., Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong. 17-18 (May 7, 1987) (testimony of FTC Chairman Daniel Oliver). Chairman Oliver explained that, in the case of the cigarette industry:

> [I]t is entirely reasonable to suppose that one action against one cigarette company would have an effect on all of them, and that you would not have to make a rule. You would do the same thing much faster bringing a single case; that would benefit the consumers. So my job is deploying resources, and I would much prefer to bring a case, which can be done in a tenth of the time that making a rule can be done. I think that's a more effective way to deploy law enforcement resources for the benefit of the consumer.

Id. at 19; *see also, e.g.*, Roscoe B. Starek, III, *Prosecutorial Discretion: A View From The Federal Trade Commission*, Regulation, Fall 1997, at 24, 25-26, *available at* http://www.cato.org/pubs/regulation/reg20n4d.pdf (visited March 28, 2007) (FTC commissioner explaining that the FTC "interprets and implements the FTC Act primarily through the prosecution and adjudication of individual cases").

5. Finally, the degree of the FTC's regulatory control over the marketing of light cigarettes is illustrated by the numerous lower-court decisions recognizing the legal effect of the Commission's acts. Specifically, several courts have concluded that the FTC's actual, detailed oversight in this area precludes efforts to attack the use of descriptors under state law. For example, in *Brown v. Brown & Williamson Tobacco Corp.*, No. 06-30130, 2007 WL 470406 (5th Cir. Feb. 14, 2007), the Fifth Circuit held that "the use of FTC-approved descriptors [such as 'lights' and 'lowered tar and

nicotine'] cannot constitute fraud." *Id.* at *6. The Court explained that "[c]igarettes labeled as 'light' and 'low-tar' do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement. In fact, [cigarette m]anufacturers are essentially forbidden from making any representations as to the tar and nicotine levels in their marketing about tar that are not based on the FTC method." *Id.* The panel thus concluded that "[t]he terms 'light' and 'lowered tar and nicotine' cannot, therefore, be inherently deceptive or untrue." *Id.* Moreover, it concluded, "[t]o hold that the [m]anufacturers' use of the FTC-approved terms relating the FTC-approved measurement system constitutes affirmative misstatement under State law would directly undermine the entire purpose of the standardized federal labeling system and most courts have been reluctant to find liability on this basis." *Id.*

Another court recently observed that "the FTC could, and did, specifically authorize all United States tobacco companies to utilize the words 'low,' 'lower,' 'reduced' or like qualifying terms, such as 'light,' so long as the descriptive terms are accompanied by a clear and conspicuous disclosure of the 'tar' and nicotine content in milligrams of the smoke produced by the advertised cigarette," and held that this precluded the imposition of liability for such conduct under a state consumer protection statute. *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 50 (Ill. 2005), *cert. denied*, 127 S. Ct. 685 (2006). Several other decisions are in accord. *See, e.g., Prado Alvarez v. R.J. Reynolds Tobacco Co.*, 313 F. Supp. 2d 61, 75 (D.P.R. 2004) (holding that challenges to descriptors "conflict with the FTC's regulation of the area"), *aff'd*, 405 F.3d 36 (1st Cir. 2005); *Good v. Altria Group, Inc.*, 436 F. Supp. 2d 132, 138 (D. Me. 2006) (the FTC has determined that "descriptors are not forbidden and are not unfair or deceptive (at least if not unsubstantiated)"); *Pearson v. Philip Morris, Inc.*, No. 02-11 2006 WL 663004, at *1 (Or. Cir. Ct. Feb. 23, 2006) ("The

FTC also specifies the machine-measured yields a cigarette can give and still qualify for a description as 'low tar.'").

CONCLUSION

For the reasons set forth above, in testing, marketing and selling light cigarettes, Respondents are subject to comprehensive and detailed federal regulatory directives. As a result, if the Court concludes that the Eighth Circuit applied the correct legal standard for private-party removal under 28 U.S.C. § 1442(a)(1), it should affirm the decision below.

Respectfully submitted,

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